

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )

Geographic Partitioning and Spectrum )  
Disaggregation by Commercial Mobile )  
Radio Service Licensees )

WT Docket No. 96-148

Implementation of Section 257 of the )  
Communications Act — )  
Elimination of Market Entry Barriers )

GN Docket No. 96-113

To: The Commission

MOTION FOR STAY PENDING JUDICIAL REVIEW

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## TABLE OF CONTENTS

SUMMARY .....	iii
I. RTG IS LIKELY TO PREVAIL ON THE MERITS .....	3
A. The Order Violates Section 309(j)(3) & (4) of the Communications Act. . .	3
1. The R&O Fails to Ensure Rural Telephone Companies an Opportunity to Provide Broadband PCS. ....	6
2. The <i>R&amp;O</i> Denies Service to Rural America. ....	11
B. The <i>R&amp;O</i> is Arbitrary and Capricious. ....	15
1. The <i>R&amp;O</i> Lacks Reasoned Justification and Contradicts, without Explanation, Prior Commission Factual Findings and Legal Conclusions. ....	15
2. The Order Drastically Alters the PCS Auctions <i>Ex Post Facto</i> . . . .	19
II. RTG WILL BE IRREPARABLY HARMED IF THE STAY IS NOT GRANTED .....	21
III. GRANT OF A STAY WILL NOT HARM INTERESTED PARTIES .....	23
IV. THE PUBLIC INTEREST FAVORS GRANT OF THE STAY .....	24
V. CONCLUSION .....	26

## TABLE OF CONTENTS

SUMMARY .....	iii
I. RTG IS LIKELY TO PREVAIL ON THE MERITS .....	3
A. The Order Violates Section 309(j)(3) & (4) of the Communications Act. . .	3
1. The R&O Fails to Ensure Rural Telephone Companies an Opportunity to Provide Broadband PCS. ....	6
2. The R&O Denies Service to Rural America. ....	11
B. The R&O is Arbitrary and Capricious. ....	15
1. The R&O Lacks Reasoned Justification and Contradicts, without Explanation, Prior Commission Factual Findings and Legal Conclusions. ....	15
2. The Order Drastically Alters the PCS Auctions <i>Ex Post Facto</i> . . . .	19
II. RTG WILL BE IRREPARABLY HARMED IF THE STAY IS NOT GRANTED .....	21
III. GRANT OF A STAY WILL NOT HARM INTERESTED PARTIES .....	23
IV. THE PUBLIC INTEREST FAVORS GRANT OF THE STAY .....	24
V. CONCLUSION .....	25

## SUMMARY

RTG seeks a stay pending judicial review of the modification of the Commission's rule which previously allowed PCS licensees to geographically partition their licenses only to rural telephone companies. By allowing PCS licensees to partition to any eligible entity, the Commission will impair the opportunity of rural telephone companies to provide PCS and delay the provision of PCS to rural America in contravention of Section 309(j) of the Communications Act.

A stay is justified because there is substantial likelihood that RTG will prevail on the merits of its petition for review, and RTG will suffer irreparable harm in the absence of a stay. RTG is likely to succeed in its challenge because by eliminating rural telephone companies' exclusive right to partition a PCS license, the Commission has effectively eliminated the only designated entity preference designed to ensure rapid delivery of PCS to rural areas and an opportunity for rural telephone companies to provide PCS. Auction provisions designed for "entrepreneurs" and "small businesses" do not satisfy the mandate of Section 309(j).

The Commission's order is arbitrary and capricious because it lacks reasoned justification and contradicts, without explanation, prior Commission factual findings and legal conclusions. The Commission fails to explain the lack of a designated entity preference for rural telephone companies, and it fails to explain how PCS will be provided to rural America.

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<b>Elimination of Market Entry Barriers</b>	)	

**To: The Commission**

**MOTION FOR STAY PENDING JUDICIAL REVIEW**

The Rural Telecommunications Group ("RTG"),<sup>1</sup> pursuant to Section 416(b) of the Communications Act of 1934, as amended ("Communications Act"), hereby requests a stay pending judicial review of the Federal Communications Commission ("FCC" or "Commission") *Report and Order and Further Notice of Proposed Rulemaking* ("R&O") released December 20, 1996 in the above-referenced proceeding. The R&O modifies Section 24.714 of the Commission's rules by eliminating rural telephone companies' exclusive right to partition a license to construct and operate a personal communications services ("PCS") system. RTG filed a petition for review of the R&O with the United States Court of Appeals for the District of Columbia Circuit on February 5, 1997.

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<sup>1</sup> RTG is a group of concerned rural telephone companies who have joined together to promote the efforts of all rural telephone companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and under-served parts of the country. RTG was an active participant in the proceeding before the Commission.

RTG seeks a stay to preserve the status quo until the Court of Appeals has had the opportunity to pass on the validity of the *R&O*.<sup>2</sup> By allowing PCS licensees to partition to any eligible entity, the *R&O* impairs the opportunity of rural telephone companies to provide PCS and delays the provision of PCS to rural America in contravention of Section 309(j) of the Communications Act.<sup>3</sup>

Under the familiar standard for evaluating a stay request, the Commission should grant a stay pending judicial review where: (1) the movant is likely to prevail on the merits of the appeal; (2) the movant will likely suffer irreparable harm absent a stay; (3) others will not be harmed if a stay is issued; and, (4) the public interest favors grant of a stay. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), *modified*, *Metropolitan Area Transit Comm'n v. Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). "The test is a flexible one." *Population Inst. v. McPherson*, 797 F2d 1062, 1078 (D.C. Cir. 1986). A stay may be granted with "either a high likelihood of success and some injury, or vice versa." *Id.*, *citing*, *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

RTG will demonstrate herein that there is justification for a stay of the *R&O*. However, should the Commission conclude that a stay of the *R&O* is not warranted, RTG requests alternative relief.

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<sup>2</sup> If the Commission does not take action by February 27, 1997, RTG intends to seek a stay from the Court of Appeals.

<sup>3</sup> 47 U.S.C. § 151, *et. seq.*

On February 5, 1997, the National Telephone Cooperative Association and the Independent Alliance filed a Petition for Reconsideration of the *R&O*. Pursuant to Section 1.430(k) of the FCC's rules, RTG requests that if the Commission is unwilling to stay the *R&O* pending litigation in the court, that the Commission at least stay the effectiveness of the *R&O* pending a decision on reconsideration.

## **I. RTG IS LIKELY TO PREVAIL ON THE MERITS**

The *R&O* results in the establishment of new Commission policy which denies rural telephone companies an opportunity to participate in PCS and delays the provision of PCS to rural America in contravention of the Congressional mandate set forth in Section 309(j) of the Communications Act. In addition, the *R&O* ignores, without explanation, prior Commission factual and legal findings. Because the *R&O* is both unlawful and arbitrary and capricious, RTG is likely to prevail on the merits of the appeal.

### **A. The Order Violates Section 309(j)(3) & (4) of the Communications Act.**

The Omnibus Budget Reconciliation Act of 1993<sup>4</sup> ("1993 Budget Act") added a new Section 309(j) to the Communications Act.<sup>5</sup> That section directs the Commission to award certain classes of licenses and permits on the basis of competitive bidding, and, for that purpose, to design and test various auction methodologies that promote the general purposes

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<sup>4</sup> Pub. L. 103-66, Title VI, § 6002, 107 Stat. 312, 388.

<sup>5</sup> 47 U.S.C. § 309(j).

of the Communications Act and specific enumerated objectives. These specific objectives are incorporated in the Congressional directive that the Commission:

- (A) [promote] the development and rapid deployment of new technologies, products, and services for the benefit of the public, **including those residing in rural areas...**; [and]
- (B) ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women.<sup>6</sup>

Most significantly, in prescribing regulations to implement competitive bidding systems that meet Congress' objectives, Section 309(j)(4)(D) of the Communications Act requires the Commission to:

ensure that small businesses, **rural telephone companies**, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services.<sup>7</sup>

Sections 309(j)(3) and (4) of the Communications Act impose on the Commission an affirmative obligation to design auction procedures that provide rural telephone companies a meaningful opportunity to participate in new spectrum-based services like PCS. This obligation is related to, but independent of, the Commission's obligation to ensure a meaningful opportunity for other "designated entities" to participate in the provision of such

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<sup>6</sup> 47 U.S.C. § 309(j)(3)(A) & (B) (emphasis added).

<sup>7</sup> 47 U.S.C. § 309(j)(4)(D) (emphasis added).



services.<sup>8</sup> The legislative history of the 1993 Budget Act clearly indicates this intent. The Conference Report states:

The Conferees also agreed to require that the Commission provide economic opportunities for rural telephone companies in addition to small businesses and businesses owned by members of minority groups and women.<sup>9</sup>

The obligation to ensure rural telephone companies such opportunities stems from Congress' recognition that rural telephone companies have historically provided telecommunications service to rural areas that other entities, large or small, were unwilling or incapable of providing.<sup>10</sup> Many rural telephone companies are rural cooperatives, owned entirely by rural Americans who subscribe to the telephone service. These cooperatives were formed because no other entity was willing to provide telephone service to isolated geographic areas with low population density. These cooperatives have a vested interest in bringing all forms of telecommunications services to their rural subscribers and, but for the initiative they have shown in continuing to advance telecommunications services in these areas, the rural communities would wither and die.

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<sup>8</sup> In this and related proceedings, the enumerated entities in Section 309(j) have been collectively referred to as designated entities. *See generally*, Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994) ("*Second R&O*").

<sup>9</sup> H.R. Rep. No. 213, 103d Cong., 1st Sess. 484 (1993) ("H.R. Rep No 103-213").

<sup>10</sup> For example, rural telephone companies were quick to deliver cellular telephone service to their rural customers. Other cellular companies determined that these areas were not economically viable and would be too costly to serve and agreed to allow rural telephone companies to obtain the licenses to provide the service.

**1. The R&O Fails to Ensure Rural Telephone Companies an Opportunity to Provide Broadband PCS.**

In adopting general auction procedures, the Commission decided to craft policies for designated entities that met the needs of each particular class.<sup>11</sup> The Commission adopted bidding credits and installment payments for small businesses, certain preferences for minority and female owned businesses, and partitioning for rural telephone companies.<sup>12</sup> The Commission considered and rejected awarding bidding credits to rural telephone companies, limiting bidding credits to entities that the Commission concluded lacked access to capital.<sup>13</sup> Instead, the Commission adopted a plan whereby PCS licensees could geographically partition part of their license area to a rural telephone company. The Commission reasoned that, "[a]llowing partitioning of rural areas served by rural telephone companies provides a viable opportunity for many of these designated entities who desire to offer PCS to their customers..."<sup>14</sup> The Commission concluded:

We have decided not to adopt any other auction-related measures specifically for rural telephone companies in this Order. We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband PCS in their rural telephone service areas, consistent with our statutory mandate.<sup>15</sup>

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<sup>11</sup> See *Second R&O*.

<sup>12</sup> See *In re Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5597-99 (1994) ("*Fifth R&O*").

<sup>13</sup> See *Second R&O* at ¶ 243-244; *In re Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 at ¶ 111 (1994) ("*Fifth MO&O*").

<sup>14</sup> *Fifth R&O* at ¶ 152.

<sup>15</sup> *Fifth R&O* at ¶ 153.

Under the competitive bidding procedures established for broadband PCS, a rural telephone company seeking to provide PCS could either expend substantial resources participating in the PCS auctions, or it could abstain from the auctions and negotiate with a PCS licensee for a small geographic area. Due to the Commission's decision to license PCS in Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs"), if a rural telephone company competed in the auctions, it would have to have sufficient access to capital to purchase and construct a system in a very large geographic area. Therefore, for many rural telephone companies, the alternative of waiting out the auction and subsequently partitioning a small area provided an attractive and realistic opportunity to provide service in and around its rural area.

In the *R&O* however, the Commission eliminated this benefit to rural telephone companies before they had an opportunity to take advantage of it. By eliminating rural partitioning, the Commission has failed to ensure that rural telephone companies have an opportunity to provide PCS to rural areas in violation of its Congressional mandate.

In the *R&O*, the Commission claims that rural telephone company partitioning was not the sole means of fulfilling its Congressional mandate because "[r]ural telcos *are able* to take advantage of the special provisions for small businesses we designed in our auction rules to obtain licenses in the entrepreneur block auctions."<sup>16</sup> This is simply untrue.

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<sup>16</sup> *R&O* at ¶ 15 (emphasis added).

In the *Fifth R&O*, the Commission designated frequency blocks C and F as "entrepreneurs' blocks," and limited the size entity that could bid for these blocks of PCS spectrum.<sup>17</sup> In order to bid in the C and F blocks an applicant (including attributable investors and affiliates) had to have total assets of less than \$500 million and gross revenues of less than \$125 million for the preceding two years.<sup>18</sup> In order to qualify for benefits accorded a "small business," an applicant (including attributable investors and affiliates) had to have less than \$40 million in gross revenues averaged over the previous three years.<sup>19</sup>

Nearly all rural telephone companies met the Commission's definition of "entrepreneur," however, many rural telephone companies were unable to take advantage of the Commission's "small business" or "very small business" definitions. Rural telephone companies that happened to meet the Commission's definition of "entrepreneur," "small business" or "very small business," or that had the opportunity to structure themselves to fit these definitions, might have taken advantage of those provisions had they known that rural partitioning, a far better opportunity, would no longer be an alternative. However, rural telephone companies who chose instead to rely on their exclusive ability to partition *are not*

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<sup>17</sup> See generally, *Fifth R&O* (setting a cap, based on gross revenues and total assets, to limit eligibility to participate in the entrepreneur's block auction). The Commission subsequently modified the rules for these blocks in the *Fifth MO&O*. See generally, *Fifth MO&O* at ¶ 6.

<sup>18</sup> *Fifth MO&O* at ¶ 17.

<sup>19</sup> *Fifth MO&O* at ¶ 17. For the F block, the Commission later created an additional class of "very small business" for entities (including attributable investors and affiliates) that had gross revenues not exceeding \$15 million. 47 C.F.R. § 24.720(b)(2).

now able to take advantage of the entrepreneur or small business provisions because the deadline for participating in the last PCS auction closed August 1, 1996<sup>20</sup> and the Commission did not even propose to eliminate rural partitioning until July 15, 1996 -- a mere two weeks prior to the auction deadline!<sup>21</sup>

Moreover, in reality, the "entrepreneur," "small business" and "very small business" provisions failed to provide rural telephone companies with a realistic opportunity to obtain PCS licenses to provide PCS to rural areas. Auctions for the so-called entrepreneur's C block were flooded with capital and the licenses sold for amounts well beyond the capability of most rural telephone companies.<sup>22</sup> As the auction results have borne out, very few rural

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<sup>20</sup> See Public Notice, DA 96-1064 (July 1, 1996) (announcing July 31, 1996 as the deadline for submitting applications to participate in the 10 MHz PCS D, E and F block auction), extended by Public Notice, DA 96-1026 (released June 26, 1996). For those rural telephone companies seeking partitioned licenses in the C block, the deadline for participating in the auction occurred on November 6, 1995. See Public Notice, FCC Issues New Procedures, Terms and Conditions for Broadband PCS C Block Auction, released Oct. 6, 1995.

<sup>21</sup> The Commission first proposed the idea of eliminating the exclusive partitioning right for rural telephone companies on July 15, 1996. See, *In re Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers*, WT Docket 96-148, GN Docket 96-113, *Notice of Proposed Rulemaking* (rel. July 15, 1996) ("*NPRM*"). However, given the amount of planning and preparation needed to prepare for the D, E, and F block PCS auction, there was not enough time for rural telephone companies to prepare last minute auction applications.

<sup>22</sup> See, Comments of the National Telephone Cooperative Association; WT Docket No. 96-148 at 4 (filed August 16, 1996) ("*NTCA Comments*"); Comments of the Organization for the Promotion and Advancement of Small Telephone Companies, WT Docket No. 96-148 at 6-7 ("*OPASTCO Comments*"); Comments of Century Personal Access Network, Inc., WT Docket No. 96-148 at 9 ("*Century Comments*").

telephone companies could compete for licenses in the entrepreneur's block auctions and the Commission can not rely on those provisions to satisfy its obligation to disseminate PCS licenses to rural telephone companies.<sup>23</sup>

For the vast majority of rural telephone companies, rural partitioning was the only realistic opportunity, narrowly tailored by the Commission, to benefit the particular class of designated entity, *i.e.*, rural telephone companies, Congress sought to promote.<sup>24</sup> The elimination of this benefit substantially alters the nature of the PCS auction scheme in violation of Section 309(j). The fact that some rural telephone companies might have been eligible for benefits designed for other entities does not meet the demands of the Communications Act.<sup>25</sup> Nor, does it ensure the rapid deployment of new technologies to rural Americans. Accordingly, the FCC's attempted justification for elimination of rural telephone companies' exclusive right to partition PCS licenses does not excuse the Commission's violation of the Communications Act's requirement that the Commission create affirmative procedures to ensure that rural telephone companies have a meaningful opportunity to participate in the provision of broadband PCS to rural areas.

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<sup>23</sup> See Public Notice, *D, E, and F Block Auction Closes*, DA 97-81 (Jan. 15, 1997) ("*F Block Notice*") (only 32 rural telecommunications entities won licenses); Public Notice, *Entrepreneurs' C Block Auction Closes*, DA 96-716, (May 8, 1996) ("*C Block Notice*").

<sup>24</sup> *Fifth MO&O* at ¶ 112.

<sup>25</sup> "Entrepreneurs" are not among the enumerated entities whose participation Congress sought to ensure.

## **2. The R&O Denies Service to Rural America.**

By eliminating the rural partitioning rule, the Commission will deny the introduction of PCS to rural America in violation of Section 309(j)(3) of the Communications Act. Congress mandated that the Commission provide rural telephone companies an opportunity to provide PCS because Congress understood that rural telephone companies were particularly well suited to deliver new spectrum-based services to rural America. Indeed, the Commission itself concluded:

[W]e recognize that their existing infrastructure makes rural telephone companies well suited to introduce PCS services rapidly into their service areas and adjacent areas. Thus, this action [establishing rural partitioning] will help speed service to rural areas, which tend to be less profitable to serve for companies without existing infrastructure than more densely populated urban areas.<sup>26</sup>

The record in this proceeding further supports the conclusion that by virtue of their existing wireline facilities (*e.g.*, towers, poles, conduits, switches, and personnel), rural telephone companies are in the best position to rapidly provide PCS to Americans residing in rural areas.<sup>27</sup> Any non-rural telephone company faces a tremendous financial burden if it wishes to build the infrastructure necessary to reach low-density population areas and persons situated in remote and/or rugged terrain or harsh climates. A non-rural telephone company has no economic incentive to undertake the responsibility of ensuring that the rural areas of

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<sup>26</sup> *Fifth R&O* at ¶ 149; *see also Id.* at ¶ 152.

<sup>27</sup> *See e.g.*, Comments of the Rural Telecommunications Group, WT Docket No. 96-148, at 2 (filed Aug. 15, 1996); Comments of OPASTCO, WT Docket No. 96-148, at 8-9 (filed Aug. 15, 1996); Comments of the Rural Cellular Association, WT Docket No. 96-148, at 4 (filed Aug. 15, 1996) ("RCA Comments"); Comments of Illuminet and the Independent Alliance, WT Docket No. 96-148, at 3-4 (filed Aug. 15, 1996) ("Illuminet Comments").

the country receive quality, innovative PCS services in a timely manner. A rural telephone company, on the other hand, can serve remote areas without the need to develop an entire infrastructure. Moreover, due to their existing strong relationships with their rural communities, rural telephone companies have a strong incentive to see that these communities are not bypassed by new technologies that will link them to the "information superhighway."

Absent the exclusive rural telephone partitioning rule, or geographic-based performance requirements,<sup>28</sup> there is *no* incentive for a PCS licensee to provide service to or partition part of its service area to an entity seeking to serve a small rural area.<sup>29</sup> Prior to the rule changes of the *R&O*, rural telephone companies were required to partition an area reasonably related to their wireline service areas that includes *all* portions of the wireline service area.<sup>30</sup> The *R&O*, however, removed any geographic restrictions on what area had to be partitioned and on where service had to be provided within the partitioned area.<sup>31</sup> The removal of that requirement all but seals the fate of PCS systems being built in remote, rural

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<sup>28</sup> The FCC refused to adopt geographic-based construction requirements for PCS as was the case with the cellular radio service. Instead, the FCC adopted population-based performance requirements for PCS licensees. As a result, PCS licensees need only provide service to urban areas and have no incentive to build PCS systems in high-cost rural areas. The reason cellular radio service enjoys nearly ubiquitous coverage across the nation is because the FCC's rules imposed a "build it or lose it" requirement for cellular licensees. Cellular licensees who did not provide 32 dBu coverage to an area within five years of obtaining a license lost the exclusive right to provide service to the unserved area and that unserved area became fair game for anyone seeking to provide the service. 47 C.F.R. § 22.947.

<sup>29</sup> See *e.g.*, NTCA Comments at 4; Century Comments at 8.

<sup>30</sup> See *Fifth R&O* at ¶ 151.

<sup>31</sup> See *R&O* at ¶ ¶ 23-24, 42.



areas. This coupled with the fact that licensees for A, B and C block licenses need only provide coverage to one-third of the population of the license area within five years and to two-thirds of the population within ten years (and licensees for D, E, and F block licenses need only provide coverage to one-fourth of the population within five years<sup>32</sup>) further minimizes the chances of PCS systems being built in rural America.

The economics of partitioning provide a further disincentive for PCS licensees to partition to an entity that will serve rural areas. Licensees seeking to partition their spectrum will save on transactional costs by partitioning larger areas to larger companies who will provide service only to relatively highly populated areas. RTG is aware of specific negotiations between PCS licensees and rural telephone companies to partition rural areas that were abruptly terminated as a result of both the issuance of the *Notice of Proposed Rulemaking*<sup>33</sup> and the resulting *R&O*. The PCS licensees chose instead to partition larger geographic areas and in one instance an entire state to a larger telecommunications company.

In addition, licensees intending to eventually merge with or be acquired by larger entities do not want to partition to rural telephone companies because it carves up the license area, turning it into a piece of swiss cheese and thereby devaluing the market. RTG members have experienced this scenario in attempting to negotiate partitioned licenses from wireless

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<sup>32</sup> 47 C.F.R. § 24.203(a); *See R&O* at ¶¶ 37-43.

<sup>33</sup> *NPRM supra* note 21.

cable licensees.<sup>34</sup> Rural America will thus remain unserved as there is no incentive for larger companies to serve high cost areas.

The rural telephone partitioning rule both provided rural telephone companies with an opportunity to provide PCS and placed a strong incentive on licensees to partition to entities seeking to provide service to rural areas. Elimination of the rural partitioning right removes this incentive and violates Section 309(j). In the *R&O*, the Commission claims that the elimination of the rural partitioning rule does not violate Section 309(j)(3) because:

While encouraging rural telco participation in PCS service offerings is an important element in meeting these goals [rapid deployment of service], Congress did not dictate that this should be the sole method of ensuring the rapid deployment of service in rural areas.<sup>35</sup>

While rural telephone company partitioning is not the sole method of ensuring the rapid deployment of service in rural areas as required by the Congressional mandate, it was the only method the Commission devised to ensure rapid deployment to rural America.

Accordingly, the Commission may not now simply choose to ignore it without a comparable substitute. Nor can the Commission change the rule mid-stream when rural telephone

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<sup>34</sup> In 47 C.F.R. § 21.931 the Commission permitted partitioning to any entity in recognition of the fact that the wireless cable service was an encumbered service (*i.e.*, incumbent licensees needed the flexibility to partition after the auction to have auction license areas match already existing wireless cable service areas). *See also* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, MM Docket 94-131, PP Docket 93-253, rel. June 30, 1995, at ¶ 47.

<sup>35</sup> *R&O* at ¶ 15.

companies seeking to provide service to rural America gave up other opportunities to acquire licenses at auction in reliance on the rural partitioning rules.

**B. The *R&O* is Arbitrary and Capricious.**

**1. The *R&O* Lacks Reasoned Justification and Contradicts, without Explanation, Prior Commission Factual Findings and Legal Conclusions.**

The *R&O* is arbitrary and capricious because it lacks reasoned justification for eliminating rural partitioning. The *R&O* rests on the conclusion that open eligibility for partitioning will increase competition in the PCS marketplace by allowing additional entities to enter the market.<sup>36</sup> The Commission did not find that rural partitioning was not necessary to ensure that rural telephone companies had an economic opportunity to provide broadband PCS. In fact, the Commission neither addresses specifically, nor explains the absence of provisions tailored to ensure opportunity for rural telephone companies. It merely concludes that open partitioning will advance the objective of Section 309(j) by "allowing PCS licensees to partition to multiple entities."<sup>37</sup>

The *R&O* cannot be justified on the grounds that "[r]ural telcos are able to take advantage of the special provision for small businesses we designed in our auction rules to obtain license in the entrepreneur block auctions."<sup>38</sup> As discussed above, in the PCS auction

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<sup>36</sup> *R&O* at ¶ 13.

<sup>37</sup> *R&O* at ¶ 15.

<sup>38</sup> *R&O* at ¶ 15.

scheme, the Commission purported to adopt only one specific benefit for rural telephone companies, separate from the benefit adopted for "entrepreneurs" and "small businesses." With the Commission only now depriving rural telephone companies of the specific partitioning benefit, it is too late for them to take advantage of the latter benefit afforded "entrepreneurs," "small businesses" or "very small businesses." The PCS auctions have long since concluded, and the Commission's rules (not to mention 20th century technology) do not permit interested rural telephone companies to travel back in time to participate in the PCS auctions as entrepreneurs or small or very small businesses.

Moreover, the entrepreneur and small business provisions were not designed to benefit rural America or rural telephone companies. As discussed above, at the time of auction, a particular rural telephone company might or might not fit the definition of small business or entrepreneur. These provisions applied only to certain frequency groups and required the bidder to acquire an entire license area. The entrepreneur provisions did not address the needs of the vast majority of rural telephone companies who could not afford to acquire and construct multiple BTAs.<sup>39</sup> That is why in creating the rural partitioning plan the Commission noted that it would allow rural telephone companies who could not afford to bid for BTAs to acquire PCS licenses through geographic partitioning!<sup>40</sup> The auctions themselves

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<sup>39</sup> Most rural telephone companies' landline service areas overlap small portions of several BTAs.

<sup>40</sup> *Fifth R&O* at ¶ 152.

demonstrated this result. As discussed above, the entrepreneur and small business provisions did not successfully disseminate PCS licenses to rural telephone companies.<sup>41</sup>

The findings and conclusions in the *R&O* are unsupported by the record and contradict prior Commission rulings without adequate explanation. Having previously determined that rural partitioning was "an efficient method of getting a license in the hands of an entity that will provide rapid service to rural areas,"<sup>42</sup> the Commission now concludes that increasing the number of parties that may partition "will speed service to underserved or rural areas."<sup>43</sup> The Commission does not attempt to explain the departure from its earlier conclusion nor to explain the incentive a non-rural telephone company will have to provide service to an underserved or rural area. The Commission also does not explain what it means by "underserved areas" or how those areas relate to the rural areas contemplated by the Communications Act. In support of its conclusion, the Commission relies on a few commenting parties who summarily conclude that increasing competition and allowing additional parties to partition will create additional opportunities for small businesses, niche services, and rural wireless providers.<sup>44</sup> However, neither these parties nor the Commission specifically consider the impact on rural America or how these purported new entrants will overcome the lack of infrastructure and the realities of providing service to rural areas which,

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<sup>41</sup> See *supra* note 23.

<sup>42</sup> *Fifth R&O* at ¶ 152.

<sup>43</sup> *R&O* at ¶ 14.

<sup>44</sup> *R&O* at ¶ 7 and accompanying note.

as the Commission notes, are "less profitable to serve for companies without existing infrastructure than more densely populated urban areas."<sup>45</sup> In short, the record in this proceeding simply does not support the conclusion that open partitioning will speed service to rural areas.

The Commission also failed to give consideration to or reasoned justification for rejecting a limited right of first refusal for rural telephone companies. The Commission argues that "[g]ranting rural telephone companies a right of first refusal would limit the number of parties that could obtain partitioned PCS licenses"<sup>46</sup> This conclusion is clearly contrary to the facts in the record. The limited right of first refusal which rural telephone companies' proposed<sup>47</sup> would not limit the number of parties since any eligible party could partition once a rural telephone company had exercised its right or rejected an offer.<sup>48</sup> The Commission's failure to give consideration to or a reasoned justification for rejecting a limited right of first refusal is arbitrary and capricious and will not withstand judicial scrutiny.

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<sup>45</sup> *Fifth R&O* at ¶ 149; *See also, Id.*, at ¶ 152.

<sup>46</sup> *R&O* at ¶ 17.

<sup>47</sup> *See e.g.* Comments of the National Telephone Cooperative Association, WT Docket No. 96-148, at 6 (filed August 15, 1996); Comments of Illuminet and the Independent Alliance, WT Docket No. 96-148, at 7-8 (filed August 15, 1996).

<sup>48</sup> *See e.g.*, Comments of the United States Telephone Association, WT Docket No. 96-148 at 6 (filed Aug. 15, 1996).

## **2. The Order Drastically Alters the PCS Auctions *Ex Post Facto.***

Many rural telephone companies formulated business plans which relied on the rural partitioning rule as the means of entering the PCS market.<sup>49</sup> The elimination of rural partitioning after the deadline for participating in the auctions has passed drastically alters opportunity and jeopardizes the ability of rural telephone companies to provide PCS service to rural America. In its *R&O*, the Commission dismissed this concern, summarily stating:

We are unpersuaded that our action herein will harm the rural telcos' business plans. Under the new rules adopted herein, rural telcos will be fully able to obtain partitioned PCS licenses, as they were previously.<sup>50</sup>

This conclusion is unsupported by the record and contradicts the Commission's earlier conclusion that the exclusive partitioning plan would provide rural telephone companies "with substantial capabilities to acquire licenses to provide broadband PCS in their rural telephone service areas, consistent with our statutory mandate."<sup>51</sup> The record indicates, that absent such a plan, PCS licensees will not negotiate with rural telcos for small geographic areas.<sup>52</sup>

The Commission also arbitrarily concludes:

Whether or not the rural telcos may have relied on our existing partitioning rules when designing their business plans, we find that open partitioning will not adversely affect those plans because rural telcos will be able to use their

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<sup>49</sup> *E.g.*, NTCA Comments at 5; Illuminet Comments at 4-5; RTG Comments at 8; OPASTCO Comments at 5.

<sup>50</sup> *R&O* at ¶ 16.

<sup>51</sup> *Fifth R&O* at ¶ 153.

<sup>52</sup> *See e.g.*, NTCA Comments at 4; Century Comments at 8; RTG Comments at 5; OPASTCO Comments at 6.

technical expertise and market position to compete with other parties to obtain partitioned PCS licenses for rural areas.<sup>53</sup>

This statement contradicts the reasoning and conclusions for opening partitioning. The Commission concludes that opening partitioning will "increase[] competition in the PCS marketplace" by encouraging new entrants.<sup>54</sup> The Commission is either widely naive or capricious to conclude that this increase in competition will not impact rural telcos' business plans. This is especially true since any entity, including large, deep-pocketed, companies can now compete to acquire partitioned licenses for any size geographic area. PCS licensees are already "shopping" partitioning deals to the highest bidder. Unfortunately for rural America, the highest bidder is seeking larger geographic areas and as a result, PCS licensees seeking to save on numerous transaction costs, prefer to enter into one large deal than numerous smaller deals with rural telephone companies seeking to serve rural areas. As a result, bigger companies will obtain larger areas and because there are no geographic build-out requirements or threat of losing unserved area, rural telephone companies and rural America will be left unfulfilled in their quest to provide PCS.

If the Commission wants to change its PCS auction related rules, it may do so only after reasoned analysis which carefully considers the Commission's obligation to ensure the rapid deployment of new services to rural areas and opportunities for rural telephone

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<sup>53</sup> *R&O* at ¶ 16.

<sup>54</sup> *See R&O* at ¶ 13.



companies to provide spectrum-based services. The Commission has not undertaken such an analysis and the *R&O* must accordingly be set aside.

## **II. RTG WILL BE IRREPARABLY HARMED IF THE STAY IS NOT GRANTED**

RTG members attempting to enter the market to provide PCS in their rural service areas will be irreparably harmed if the Commission's *R&O* is not stayed to the extent necessary to prohibit entities other than rural telephone companies from negotiating for and obtaining PCS licenses to serve their rural service areas through the partitioning process.

Beginning March 7, 1997, the date that the challenged partitioning rules become effective, PCS licensees will be permitted to partition their licenses with any eligible entity. A Commission refusal to stay the operation of this *R&O* prejudices the issue of whether non-rural telephone companies are the best providers of PCS to rural America, and pre-judges that the court will determine that the Commission was within its authority to eliminate the exclusive rural telephone company partitioning right. A Commission refusal to grant this Motion to Stay "cloaks [the *R&O*] in a presumption of validity despite [RTG's] contentions that" the Commission is violating Section 309(j) of the Communications Act.<sup>55</sup> "This alleges a sufficiently concrete injury to [RTG], traceable to the agency's actions, and redressable by the relief [RTG] seeks, *i.e.*, [staying the *R&O* pending the outcome of an appeal]."<sup>56</sup> The

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<sup>55</sup> *JAJ Cellular v. FCC*, 54 F. 3d 834, 837 (D.C. Cir. 1995).

<sup>56</sup> *Id.*